Jan. 31 Reynolds, 2 P.M

Feb. 17 Postponed to Saturday next

Parker 3 cr. a mort

1. 91 State taxes a instrumentality
2 " " " a security of Nat'l Bank
3 " " " value under power to tax

3 Congress cannot exempt what not exempts [illegible]

No. 288.

SUPREME COURT OF THE UNITED STATES.

No. 288.

CHAUNCEY P. WILLIAMS, IN BEHALF OF HIMSELF AND ALL OTHER STOCKHOLDERS IN THE NATIONAL ALBANY EXCHANGE BANK, PLAINTIFF IN ERROR,

Mr Forman, Mr Reynolds & Mr Neely

vs.

MICHAEL A. NOLAN, THOMAS DOLAN, AND JOHN SMITH, AS THE BOARD OF ASSESSORS OF THE CITY OF ALBANY.

Mr Kernan & W. Parker

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 288.

CHAUNCEY P. WILLIAMS, IN BEHALF OF HIMSELF AND ALL OTHER STOCKHOLDERS IN THE NATIONAL ALBANY EXCHANGE BANK, PLAINTIFF IN ERROR,

vs.

MICHAEL A. NOLAN, THOMAS DOLAN, AND JOHN SMITH, AS THE BOARD OF ASSESSORS OF THE CITY OF ALBANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	4	1
Record from court of appeals	5	2
Final judgment	13	6
Citation and service	17	7
Assignment of errors	19	8
Joinder in errors	20	8

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the court of appeals of the State of New York, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in an action which is in the said court of appeals of the State of New York before you, between Chauncey P. Williams, in behalf of himself and all other stockholders in the National Albany Exchange Bank, and Michael A. Nolan, Thomas Dolan, and John Smith, as the board of assessors of the city of Albany, a manifest error hath happened to the great damage of the said Chauncey P. Williams, in behalf of himself and all other stockholders in the National Albany Exchange Bank, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the

2 same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday in December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 25th day of October, in the year of our Lord one thousand eight hundred and sixty-five, and of the independence of the United States the eighty-ninth.

[SEAL.] AUGUSTUS A. BOYCE, *Clerk.*

JOHN H. REYNOLDS,
Attorney for Pl'ff in Error, Albany, N. Y.

3 Filed Oct. 25, 1865.

4 The answer of the judges of the court of appeals of the State of New York in the within writ named doth certify, under the seal of our said court, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, and send the record whereof mention in said writ is made, with all things touching or in anywise concerning the same, as appears in a certain schedule to this writ annexed, as within it is commanded.

By the court.

[SEAL.] COR'S TEN BROECK, *Dep. Clerk.*

5 In the court of appeals of the State of New York.

CHAUNCEY P. WILLIAMS, in behalf of himself and all other stockholders in the National Albany Exchange Bank,
ag'st
MICHAEL A. NOLAN, THOMAS DOLAN and JOHN Smith, as the Board of Assessors of the city of Albany.

Take notice that the above-named defendants appeal from the judgment entered in the above action in the Albany county clerk's office, September 22d, 1865, on the decision of the general term of the supreme court of the third judicial district against said defendants in favor of said plaintiffs, to the court of appeals of the State of New York.

Yours, &c., S. F. HIGGINS,
District Attorney and Attorney for Defendants.

To GAGGER & HAND, Esq., *Plaintiffs' Attorneys.*
G. K. WINNE, *Clerk of Albany County.*

Case agreed upon.

6 Supreme court, Albany county.

CHAUNCEY P. WILLIAMS, in behalf of himself and all other stockholders in the National Albany Exchange Bank,
ag'st
MICHAEL A. NOLAN, THOMAS DOLAN and JOHN Smith, as the Board of Assessors of the city of Albany.

The above plaintiff and the above defendants having a controversy depending upon certain facts uncontradicted, do, in pursuance of the three hundred and seventy-second section of the Code of Procedure, hereby agree upon the facts upon which such controversy arose, and hereby agree to submit the same to the general term of the supreme court.

The following are the facts submitted and agreed upon, viz:

The National Albany Exchange Bank is a corporation located and doing business in the fifth ward of the city of Albany, and has been so located for more than a year last past. The said bank was organized under an act of Congress passed June 3d, 1864, entitled "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," on the 23d day of January, 1865, and the bank has in all things complied with its provisions. The plaintiff, C. P. Williams, is a stockholder in said bank, and has been for a year past. The defendants are the assessors of the city of Albany, and as such constitute the board of assessors of said city. The capital stock of the said bank is three hundred thouand dollars. At the time of making the assessment hereinafter mentioned, and now, the said bank was and is the owner of the bonds of the United States to the amount of three

hundred and seventy-seven thousand three hundred and fifty dollars, all of which were issued under the following acts of Congress, viz:

An act entitled "An act to authorize a loan," approved February 8th, 1861.

7 An act entitled "An act to authorize a national loan, and for other purposes," approved July 17th, 1861.

An act entitled "An act supplementary to an act to authorize a national loan, and for other purposes," approved August 5th, 1861.

An act entitled "An act supplementary to an act entitled 'An act to provide ways and means for the support of the government,'" approved March 3d, 1864.

The whole of the capital stock of the said bank is, and was at the time of the assessment hereinafter mentioned, invested in the bonds above set forth. The above defendants, acting as the board of assessors of the city of Albany, between the third Tuesday of April and the first day of September, 1865, assessed the above plaintiff, Chauncy P. Williams, in the fifth ward of said city of Albany for 287 shares of the capital stock of the National Albany Exchange Bank, which amount he then held and owned, and they also assessed each of the stockholders in said bank, and assessed them in said fifth ward of said city, and placed the names of the plaintiff and of all of said stockholders upon the assessment roll of said fifth ward of said city, and assessed each of them for the amount of the capital stock owned by each in said bank, and the amount of said assessment in each case was at the par value of the stock, viz, one hundred dollars per share, thus making an assessment of twenty-eight thousand seven hundred dollars against the plaintiff upon his 287 shares, and the total assessment amounting to three hundred thousand dollars.

The assessment roll of said fifth ward is now in the hands and subject to the control of the above defendants.

Therefore, upon the above facts, the following questions arise, which are hereby submitted to this court:

First. Have the above defendants, as such board of assessors, the legal power or right to assess the plaintiff or any of the stockholders in said bank for the amount held by them of the capital stock

8 of the said National Albany Exchange Bank, or for any portion thereof? and if for any, what portion?

Second. Have they the power to assess any of the stockholders of the said bank in the fifth ward who do not reside therein?

If the court should be of the opinion that such defendants have no right or legal power to place the said names of the stockholders of the said bank upon the assessment roll and assess them for the amount of the capital stock of the said bank held by them, then the judgment of the court is to be that the names of the plaintiff, and of all the other stockholders in the said bank which have been placed upon the assessment roll of the fifth ward for the amount of the capital stock of the said bank owned by them, shall be taken off the same by the defendants, and that a perpetual injunction issue against the defendants, restraining them from placing upon the assessment roll of the fifth ward in said city, the names of the plaintiff, or of any of

the stockholders in said bank, for the amount of the capital stock of the said bank owned by them.

If the court should be of the opinion that the plaintiff and the said owers of the capital stock of the said bank are liable to taxation for the amount of the capital stock held and owned by them, or for any portion thereof, then the judgment of the court is to be that the names of the plaintiff, and of the other owners of said stock, be kept upon said assessment roll, and that they are liable to taxation, and that the defendants proceed with their duty in regard to the plaintiff and the other owners in the same manner as upon ordinary cases. The surplus of the National Albany Exchange Bank is $18,000.

C. P. WILLIAMS.
M. A. NOLAN.
THOMAS DOLAN.
JOHN SMITH.

9 CITY AND COUNTY OF ALBANY, *ss:*

Chauncey P. Williams, being duly sworn, says that he is plaintiff in above-submitted case; that the facts as above set forth are true; that the controversy is real, and the proceeding in good faith, to determine the rights of the parties.

C. P. WILLIAMS.

Sworn before me this 20th day of September, 1865.
NATHAN SWARTZ, *Com. of Deeds.*

CITY AND COUNTY OF ALBANY, *ss:*

Michael A. Nolan, Thomas Dolan, and John Smith, being each duly and severally sworn, do say, and each for himself says, that he is one of the defendants in the foregoing action, and that the foregoing facts have been agreed upon as constituting the facts in this case; that the controversy is real, and the proceeding in good faith, to determine the rights of the parties.

M. A. NOLAN.
THOMAS DOLAN.
JOHN SMITH.

Sworn before me this 20th day of September, 1865.
NATHAN SWARTZ, *Com. of Deeds.*

At a general term of the supreme court of the State of New York held at the capitol, in the city of Albany, on the 21st day of September, 1865.

Present: Hon. Henry Hogeboom, Hon. Theodore Miller, Hon. Charles R. Ingalls, justices.

10 CHAUNCEY P. WILLIAMS, in behalf of himself and all other stockholders in the National Albany Exchange Bank,
ag'st
MICHAEL A. NOLAN, THOMAS DOLAN and John Smith, as the Board of Assessors of the city of Albany.

This cause coming on to be heard before this court, upon a case

agreed upon between the above parties, under the provisions of section three hundred and seventy-two of the code, and after hearing the same argued by Mr. S. Hand and J. H. Reynolds, esq., in favor of the plaintiff, and A. J. Parker, esq., in favor of defendants, and due deliberation being had thereon, it is ordered that the assessment made by the above defendants, as assessors, upon the plaintiff, and upon all the other stockholders in the National Albany Exchange Bank, for the amount of the shares of the capital stock held by them, is void.

It is further ordered, that the names of the plaintiff, and of all the other stockholders in the said bank which have been placed upon the assessment roll of the fifth ward of the city of Albany for the amount of the capitol stock of the said bank owned by them, shall (upon the service of a copy of the judgment to be entered in this action on the defendants) be taken off of said assessment roll before the same shall be delivered by said defendants to the supervisor of the fifth ward, or to any other supervisor, and before the same shall pass out of their hands or control. It is further ordered, that a perpetual injunction issue out of this court against the defendants herein, forever restraining them from placing upon the assessment roll of the fifth or any other ward of the city of Albany the names of the plaintiff, or of any of the stockholders in said National Albany Exchange Bank, for the amount of the shares of the capital stock of the said bank owned by them. It is further ordered, that judgment in pursuance of the provisions of this order be entered up and docketed against the defendants.

G. K. WINNE, *Clerk.*

11 Supreme Court, Albany county.

CHAUNCEY P. WILLIAMS, in behalf of himself and all other stockholders in the National Albany Exchange Bank,
ag'st
MICHAEL A. NOLAN, THOMAS DOLAN and John Smith, as the Board of Assessors of the city of Albany.

Judgment, Sept. 22, 1865. Cagger & Hand, Plaintiffs' Attorneys.

This action having been argued before the general term of this court, and said court having decided the same, and an order having been entered with the clerk of said court stating the terms and provisions of said decision—

Now, therefore, and in pursuance of said decision and order, and upon motion of S. Hand and J. H. Reynolds, of counsel for plaintiff, it is adjudged and decreed that the assessment made by the above defendants as the board of assessors of the city of Albany, against the above plaintiff and all other stockholders in the National Albany Exchange Bank, for the amount of the shares of the capital stock of the said bank held by them, is void.

It is further adjudged and decreed that the names of the plaintiff, and of all the other stockholders in said bank which have been

placed upon the assessment roll of the fifth ward of the city of Albany for the amount of the capital stock of the said bank owned by them, shall (upon the service of a certified copy of this judgment upon the defendants) be taken off of said assessment roll before the same shall be delivered by said defendants to the supervisor of the fifth ward, or to any other supervisor, and before the same shall pass out of their hands or control.

It is further adjudged and decreed that a perpetual injunction issue out of this court against the defendants herein, forever restraining them from placing upon the assessment roll of the fifth ward, or of any other ward of the city of Albany, the names of the plain-
12 tiff or of any of the stockholders in said National Albany Exchange Bank, for the amount of the shares of the capital stock owned by them.

G. K. WINNE, *Clerk.*

STATE OF NEW YORK, *City and County of Albany, Clerk's Office, ss:*

I, Giles K. Winne, clerk of said city and county, do hereby certify that I have compared the annexed copies of a notice of appeal and judgment roll with the originals on file in my office, and that the same are correct transcripts therefrom and of the whole of said originals.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the city of Albany, this 25th day of September, A. D. 1865.

[L. S.] G. K. WINNE, *Clerk.*

13 At a term of the court of appeals of the State of New York held for said State, at the capitol in the city of Albany, on the twelfth day of October, 1865.

Present: Hiram Denio, chief judge, presiding.

CHAUNCEY P. WILLIAMS, in behalf of himself and all other stockholders in the National Albany Exchange Bank, respondents,
ag'st
MICHAEL A. NOLAN, THOMAS DOLAN and John Smith, as the Board of Assessors of the city of Albany, appellants.

This cause having been brought on to argument on appeal by the defendants from a judgment of the supreme court of this State rendered in the second judicial district, and after hearing Mr. Amasa J. Parker for the appellants, and Mr. Samuel Hand for the respondents, and due deliberation having been thereupon had, it is ordered
14 and adjudged, and this court does hereby order and adjudge, that the said judgment appealed from be, and the same is hereby, reversed, with costs to be paid by the respondent, and judgment in this action is hereby rendered in favor of the said defendants, with costs, and it is adjudged that the names of the plaintiff and of the other owners of stock referred to in the case submitted in the court below, be kept upon the assessment roll, and that they are

liable to taxation, and that the defendants proceed with their duty in regard to the plaintiff and other owners in the same manner as in ordinary cases.

And it is hereby ordered and directed to be certified, that in this suit was drawn in question the validity of the statute of the State of New York entitled "An act enabling the banks of this State to become associations for the purpose of banking under the laws of the United States," passed March 9, 1865, on the ground that such statute was repugnant to the Constitution of the United States, and also on the ground that such statute was repugnant to the laws of the United States; and the decision of this court was in favor of the validity of such statute.

15 It is further certified as aforesaid, that in this suit was drawn in question the validity of an authority exercised under the United States, viz: an authority by national banks to exercise their corporate functions without having their stockholders subjected to taxation by State authority; and the decision was against the validity of such authority.

It is further certified, as aforesaid, that in this suit was drawn in question the construction of art. one, sec. 8, sub-division 2 and 17 of the Constitution of the United States, and a claim to exemption from taxation under said section; and the decision was against the exemption claimed under said clause of the Constitution.

It is further certified, that in this suit was drawn in question the construction of the statute of the United States entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, and a claim to a privilege or exemption from taxation under said statute; and the decision was against the

16 privilege or exemption so claimed.

A copy. COR'S TEN BROECK, *Dep. Cl'k.*

17 UNITED STATES OF AMERICA, *ss:*

To Michael A. Nolan, Thomas Dolan and John Smith, as the board of assessors of the city of Albany, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the State of New York, wherein Chauncey P. Williams, in behalf of himself and all other stockholders in the National Albany Exchange Bank, is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court of the United States, this 25th day of October, in the year of our Lord 1865.

HIRAM DENIO,
Chief Judge of the Court of Appeals.

18 I hereby admit personal service of a copy of the within,
Oct. 30, 1865. S. F. HIGGINS, *Att'y for Def'ts.*

19 Supreme Court of the United States. — Of the December term, A. D. 1865.

CHAUNCEY P. WILLIAMS, &c., plaintiff in error,
vs.
MICHAEL A. NOLAN AND OTHERS, as Board of Assessors of the city of Albany, def'ts in error.
} In error.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said Chauncey P. Williams, by John H. Reynolds, his attorney, and says that in the record and proceedings *and proceedings* aforesaid there is manifest error, in this, to wit: that by the record aforesaid it appears that the judgment aforesaid given was given for the said defendants in error against the said plaintiff in error, whereas by the law of the land the said judgment ought to have been given for the said plaintiff in error against the said defendants in error; andthe said Chauncey
20 P. Williams, plaintiff in error, prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment, &c.

JOHN H. REYNOLDS,
Attorney for Pl'ff in Error.

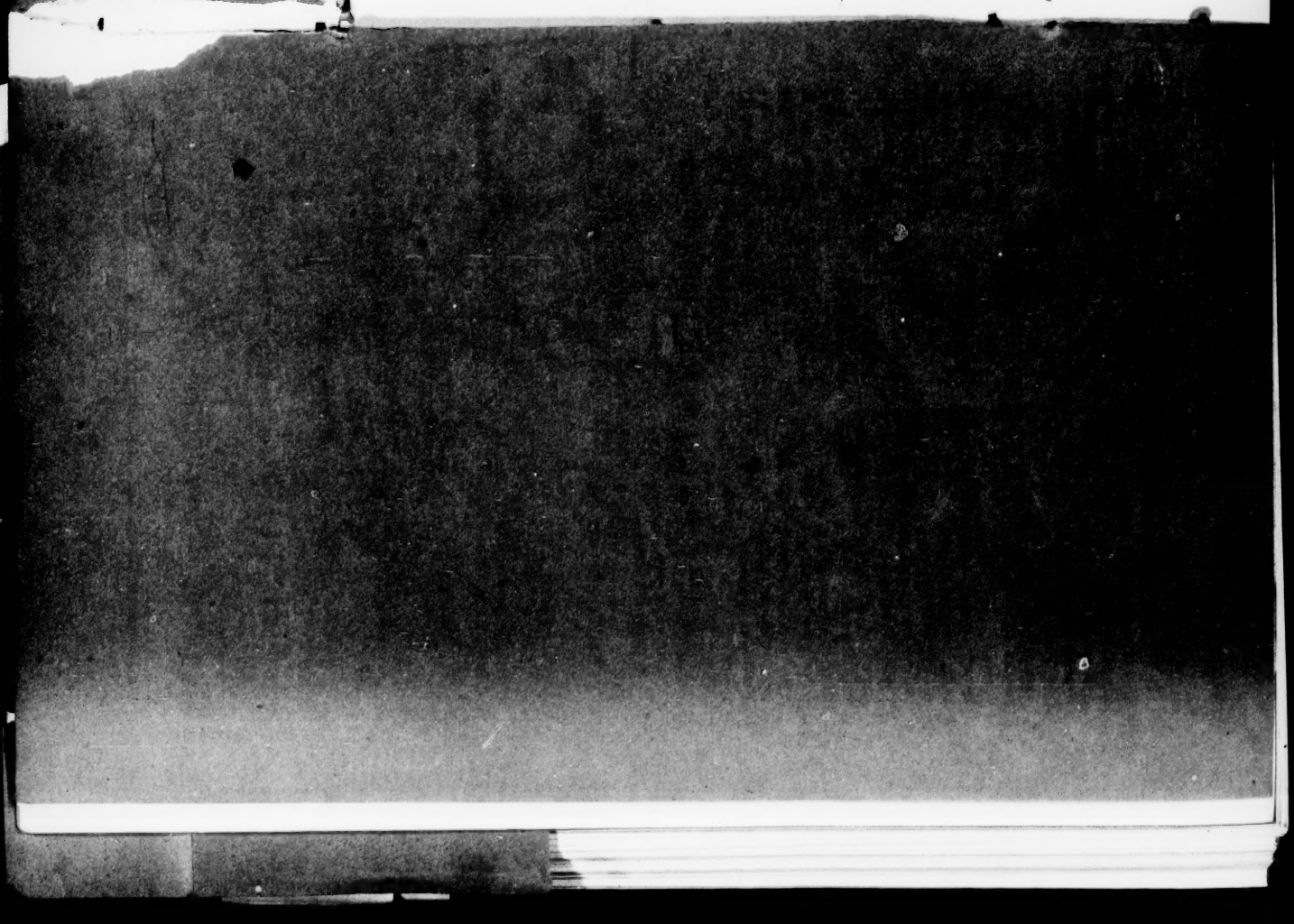
21 Supreme Court of the United States.

MICHAEL A. NOLAN AND OTHERS, as Board of Assessors of the city of Albany, def'ts in error,
ads.
CHAUNCEY P. WILLIAMS, &c., plaintiff in error.
} In error.

And afterwards, to wit, on the first Monday of December, in December term, in the year of our Lord one thousand eight hundred and sixty-five, the said Michael A. Nolan and others, as board of assessors of the city of Albany, by Amasa J. Parker, their attorney, freely comes here into court and says that there is no error, either in the record and proceedings aforesaid or in the giving of the judgment aforesaid; and they pray that the said Supreme Court of judicature, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, may be in all things affirmed, &c.

AMASA J. PARKER,
Attorney for Def'ts in Error.

Filed November 6, 1856.



IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHAUNCEY P. WILLIAMS in behalf of himself as of all others, STOCKHOLDERS of The NATIONAL ALBANY EXCHANGE BANK,

Plaintiff in Error.

vs.

MICHAEL A. NOLAN, THOMAS DOLAN and JOHN SMITH as The BOARD of ASSESSORS of the City of Albany,

Defendants in Error.

Abstract and Points for Plaintiff in Error.

The writ of error in the present case brings under review a judgment of the Court of Appeals of the state of New York, by which it was determined that the stockholders of national banks, organized under the laws of Congress, were liable to taxation by state authority, when the entire capital of the bank is invested in bonds and securities of the United States.

Under a provision of a statute of the State of New York, this case with others involving the same question, was submitted, without action, to the Supreme Court of that state, upon a state of facts agreed upon, and a judgment was given determining that the shareholders in national banks were not liable to taxation by state authority. This judgment was reversed in the Court of Appeals, and by this last judgment it was determined that the shareholders in national banks were liable to state taxation.

The facts appearing in the record upon which the question arises, are as follows:

The National Albany Exchange Bank in which the plaintiff is a shareholder, was organized on the 23d day of January, 1865, under the act of Congress of June 3, 1864, entitled "An act to provide a national currency secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," and is located and doing business in the 5th ward of the city of Albany, in the state of New York. The

plaintiff is, and for a year has been a stockholder in said bank. The defendants constitute The Board of Assessors of the city of Albany. The capital of the bank is $300,000, and at the time of the assessment of the plaintiff and the other stockholders for the purpose of state taxation, was wholly invested in bonds and securities of the United States.

The defendants acting as the Board of Assessors of the city of Albany, between the months of April and September, 1865, assessed the plaintiff in error in the 5th ward of the city of Albany, for 287 shares of the capital stock of the National Albany Exchange Bank, which he then held and owned. They also assessed each of the other stockholders of said bank in the 5th ward of the city, and placed the name of the plaintiff in error and the names of all his associate stockholders upon the assessment roll for the 5th ward of said city, and assessed each for the amount of his stock at its par value, viz: ($100 per share).

The assessment against the plaintiff in error was for $28,700, and the total assessment against all of the stockholders of the bank amounted to $300,000.

Upon these facts it was determined by the Court of Appeals of New York that the plaintiff in error and his associates were liable to state taxation and legally assessed, and the defendants were directed to retain their names upon the assessment roll for the purpose of state taxation, and by the writ of error the record of this judgment has been removed to this court for review.

POINTS FOR PLAINTIFF IN ERROR.

I. The following propositions material to the present argument, if not conceded to be true, must be regarded as established, after great consideration by the judgment of this court.

1. That the stock, bonds or securities of the federal government are not the subject of taxation by any state authority.

2. That a state has no authority to tax the stock, bonds or securities of the United States, by name, or by including them with other of the property of the tax payer, to be assessed like other property at its actual value. A state law purporting to give any such authority is void.

3. A state tax upon any securities of the United States is an illegal restriction upon the constitutional power of the general government to borrow money, and the right of a state to impose such taxation in any degree, is denied.

4. Nor can any state tax be lawfully imposed upon any of the means employed by the general government to execute any of the powers granted to it by the federal constitution.

5. Nor can the capital of a bank wholly invested in the securities of the United States be taxed for state purposes.

6. Where the power of the general government has been exercised over any subject within its jurisdiction, all state interference over the same subject is necessarily excluded absolutely. The validity of state action in such case, does not depend upon the motive with which the act is done, but whether done with a good or a bad motive, — whether reasonable in view of state convenience or necessity — or oppressive and inimical to the general government — it is alike void for want of power.

7. These principles it is believed have been fully and finally established by the judgments of this court in the following cases.

McCullough *vs.* State of Maryland, 4 Wheaton, 326.
Osborne *vs.* U. S. Bank, 9 Wheat., 738.
Weston *vs.* City of Charleston, 2 Peters, 449.
Bank of Commerce *vs.* Commissioners, 2 Black., 620.
The Bank Tax Case, 2 Wallace, 200.
Dobbins *vs.* The Commissioners, 16 Peters, 485.
Brown *vs.* State of Maryland, 12 Wheat., 419.

II. In the reasoning of the court by which the judgment now under review was pronounced, the correctness of the foregoing propositions is substantially conceded, but the judgment pronounced is supposed to be vindicated upon the following principal grounds.

1. That considering the national banks organized and existing under the act of Congress of June 3, 1864, as instrumentalities employed by the general government in the execution of acknowledged powers within the several states, and as such not subject to state taxation, the immunity of the shareholders from such taxation is not essential to the existence or usefulness of the corporate body as an agent of the general government, and that the shares or shareholders in such banks may be lawfully taxed by the state authority for state purposes.

2. The fact that the whole capital of such a bank is invested in the securities of the United States, so that the bank itself is not subject to taxation by a state, does not extend the same immunity to the shares or shareholders, and they are liable to taxation for the reason that such a tax is not upon the bank or its property, and further that the act of Congress creating such banks permits a state to tax the shareholders.

III. The proposition of the court below denying the immunity of the shareholder from taxation by a state for state purposes, is supposed to rest upon a *dictum* of Marshall Ch. J., in the case of McCullough *vs.* The State of Maryland (4 Wheaton, 316, 436) (see opinion of Denio Ch. J., Court of Appeals, pp. 7, 8). This it submitted cannot be sustained.

1. Whatever may be the force of the exception suggested by the chief justice as an original proposition, it is very obvious that as applied to the facts of that case it was but a mere *dictum*, and was not involved in the decision. The state of Maryland had not in that case attempted to levy any tax upon the stockholders of the Bank of the United States residing within its limits. It had attempted to place a stamp tax upon the notes of the Branch Bank of the United States located in Baltimore, and the state law authorizing this tax was held to be void.

2. That the question as to the right of the state of Maryland to tax the stockholders of the bank, was not involved or decided, is clear, for it is stated that the "opinion does not extend" to taxes upon real property held by the bank, nor to a tax imposed upon *the interest which the citizens of Maryland may hold in it.* That question was clearly left open for future consideration whenever it should arise, and it has not hitherto been directly before this court.

3. It is claimed, however, that the principle contended for by the plaintiff in error has been repeatedly affirmed, and it cannot be denied; if the taxation of the shares of stock in a national bank may tend in any way to impede the operations of the bank or impair its usefulness or efficiency as an instrustrument for the exertion of any of the powers of the general government. The power to tax the shares in the present case is claimed upon the ground, among others, that such taxation does not tend to impair the usefulness of the bank as the agent of the general government, and that Congress has authorized this taxation.

4. The power of Congress to create national banks has not been questioned, and it is not supposed that this power can be successfully challenged. They are therefore institutions necessary for the fiscal operations of the general government, or in the opinion of Congress "to promote the general welfare." They are thus as much its instruments as the army, navy, mint, post office, or any other of its great departments. How essential or important they may be to the government of the union, is for Congress and not for the states to determine.

Osborne *vs.* Bk. of U. S., 9 Wheat., 738–772.

5. It having been determined by the supreme power that these banks are necessary creations, it follows as a necessary consequence that the states are excluded from all interference with their operations. They can pass no laws impeding their operations, or impairing their usefulness, and above all, no power exists in the states which may under any circumstances, or in any contingency be exerted to their destruction.

The power of taxation is a sovereign power, and if it may be exerted by a state over a given subject in the least degree, the limits to its exercise cannot be circumscribed.

6. These principles have been at different times distinctly affirmed. In *McCullough vs. The State of Maryland*, 4 *Wheaton R.*, 427, Ch. J. Marshall says: "That the power of taxing it (The United States Bank) by the states, may be exercised so as to destroy it, is too obvious to be denied." Again he says (p. 429): "It is obvious that it (the power of taxation) is an incident of sovereignty, and is co-extensive with that to which it is an incident." Again he says (p. 431): "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create, that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another which other with respect to these very measures is declared to be supreme over that which exerts the control, are propositions not to be denied."

7. Assuming therefore that the power to tax a given subject is a sovereign power, and that if exerted at all it may be exerted to destroy, it is clear that if the states have power to levy a tax upon the stockholders of national banks in respect to the stock held by them, this power may be used to the destruction of the bank.

IV. It is essential to the creation and continuance of a bank organized under the act of Congress of June 3d, 1864, that it should have capital stock and stockholders. These are necessary elements to its existence. They are not brought into being simply by the law of Congress. The contribution of private capital is required and invited, and until this is supplied and the other condition of the law is fulfilled, there is no corporate existence, and after a bank has been duly organized, it is not bound to continue its existence, but may by a vote of two thirds of its stockholders wind up its affairs at any time.

Act of June 3d, 1864, §§ 5, 6, 42.

1. It follows that national banks duly organized, continue their existence only at the will of the stockholders, and it needs no argument to show that any taxation of the stockholders by a state which tends to make the investment unprofitable, also tends to the winding up of the bank, for it is but common experience that capital unprofitably invested, seeks other channels.

2. The extent to which any action of a state may impede, impair or endanger the usefulness or continuance of an agent of the general government is unimportant. If it does or may to any degree, the attempt to exercise any such power is an abuse of

it. Ch. J. Marshall in McCullough *vs.* the State of Maryland (4 Wheat., 430) says: "We are not driven to the perplexing inquiry so unfit for the judicial department, what degree of taxation is a legitimate one, and what degree may amount to the abuse of the power? *The attempt to use it on the means employed by the government of the union in pursuance of the constitution, is itself an abuse because it is the usurpation of a power which the people of a single state cannot give.*" In none of the cases adjudged in this court has it been made a question, whether the amount of state interference was of material consequence. It was only necessary to see that the power of the state *might* be so exerted as to impede the government agent, and if such might be the result, the power was denied.

3. It is seen that without the will of its stockholders, these banks can have no existence, and it must follow that any act of a state hostile to the interests of the stockholder, may and perhaps must affect the corporate body, as the corporate body is dependent for its creation in the first instance, and for its continuance upon the stockholders. This result is quite as obvious as that the taxation of the salary of the captain of a revenue cutter impeded the collection of the revenue (Dobbins *vs.* The Commissioners, 16 Peters, 435) or as the imposition of a license fee by a state upon an importer of foreign goods was an interference with the regulations of commerce (Brown *vs.* The State of Maryland, 12 Wheaton, 419), or perhaps as the imposition of a stamp duty upon notes of the United States bank, was an interference with the operations of the bank (McCullough *vs.* The State of Maryland, 4 Wheaton, 316).

4. It was conceded in the case of Dobbins *vs.* The Commissioners, that the state had no right to tax a revenue cutter employed in the service of the United States, but it was claimed that her commander might be taxed as a citizen of Pennsylvania. But this court said (16 Peters, 448): "Is the officer as such, less a means to carry into effect these great objects than the vessel which he commands — the instruments which are used to navigate her, or than the guns put on board to enforce obedience to the law? These inanimate objects it is admitted, cannot be taxed by a state, because they are means. Is not the officer more so who gives use and efficiency to the whole? Is not compensation the means by which his services are procured?"

In the present case it is admitted that the corporation cannot be taxed, but claimed that the stockholders by and through whom alone the corporate body exists or can be made promotive of the general welfare, may be taxed. Stockholders are just as essential to the bank as the captain is to a revenue

cutter. If taxing the captain is taxing a means employed by the government, it is difficult to see why taxing stockholders in a national bank is not obnoxious to the same objection.

5. In Brown *vs.* The State of Maryland (12 Wheaton, 419), the state law required the importer of foreign goods to take out and pay $50 for a license before the imported article could be sold within the state of Maryland. It was claimed that this was not a tax upon the *imported article*, but upon the *person* of the importer, but this court said (page 444): "It is impossible to conceal from ourselves that this is varying the form without varying the substance." * * "All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself." * * "*So a tax on the occupation of an importer is in like manner a tax on importation.*"

In Osborne *vs.* The Bank of the U. S., 9 Wheaton, 738, 862, said the chief justice, "The distinction between destroying what is denominated the corporate franchise and destroying its vivifying principle is precisely as incapable of being maintained, as a distincion between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade or business which is its sustenance and its immortality, if it have that property, will be a very useless attribute. This distinction then has no real existence. *To tax its faculties, its trade and occupation, is to tax the bank itself.* To destroy or preserve the one is to destroy or preserve the other." The shares and shareholders of national banks are "faculties" without the preservation of which the bank cannot exist, and to tax them is to tax the bank.

6. The two cases in South Carolina (1Nott andM cCord ,527 and 2 Bailey, 624), if they have not been substantially overruled by decisions of this court, are yet of no authority against the position of the plaintiff in error in the present case. It was conceded that by taxation the stockholders of the bank might be driven from the state, but that the bank would nevertheless exist, and this resulted from the fact that the stockholders had no power to wind up the corporation. In the present case the continuance of the corporate body is entirely dependent on the will of the stockholders, and taxing them to death necessarily destroys the bank.

7. But it will be claimed that Congress in the act creating a national system of banking has authorized the taxation of shares, by state authority, by the proviso to the forty-first section of the act which is as follows:

"*Provided*, That nothing in this act shall be construed to prevent all shares in any of the said associations held by any

person or body corporate from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state.

"*Provided further*, That the tax so imposed under the laws of any state, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the state where such association is located."

8. It is obvious that this *proviso* does not in terms confer any express power of taxation upon the states, and it is not the office of a proviso in a statute to confer a power, but rather to limit an authority conferred, or restrain in a given contingency the operation of the act (10 Wheaton 1–30, 10 Peters, 449). The section of the act to which the proviso is added declared that the banks organized should pay a certain duty into the United States Treasury "in lieu of all other taxes" (§ 41) and this proviso must be construed with respect to other premises, as well as to its general policy.

9. It cannot be supposed that Congress in establishing a national system of banking, intended to confer on the states the power of directly or indirectly taxing them out of existence, yet that result may follow if the proviso in question is held to confer a power of taxation upon the states, for although there is an apparent restriction to the same rate of taxation that is imposed upon other moneyed capital in the hands of individuals, or as may be imposed upon the shares of state banks, yet as the state power of taxation is unlimited over property within its jurisdiction, it may be exerted to the total destruction of national banks. That this may be improbable does not alter the question, as the case is not one of confidence.

10. It is the settled law of New York that the legislature of the state has absolute power in respect to taxation. They are not required to impose *equal* taxation, or that it shall be in proportion to the value of the property taxed, or that it be apportioned according to the benefit supposed to be received by the tax payer (People *vs.* Mayor of Brooklyn, 4 Comstock, N. Y., 419). Hence the apparent limitation in the proviso may be rendered wholly ineffectual to protect the bank if the state shall resort to unfriendly legislation for moneyed capital, and shares of state banks may be taxed to any extent without taxing other property — and thus if the state may tax shares in national banks at all, they may be taxed to an almost unlimited extent.

11. The act of the legislature of New York under which the taxation complained of is justified (Laws of New York, 1865, chap. 97, p 172, §10, 11) does not profess to follow the restrictions in the provisos in the act of Congress. This act only limits the imposition of a tax to the *par* value of the stock, and although the shares of state banks in New York, are not taxed at all, and never have been, yet no notice of this limitation in the proviso is taken in the New York statute (See copy statute annexed, note *a*.)

12. And the practical effect of the act of the legislature and the taxation under it, is in repudiation of the restrictions in the proviso if it be construed as conferring or permitting a limited taxation by the state. "Moneyed capital" if invested by a citizen of New York in Federal securities is not to be assessed or taxed *at any rate* whatever, yet the plaintiff and his associates are assessed at the par value of their stock, — and although the shares of state banks are not the subjects of state taxation, the legislature ignored the fact, and directs the plaintiff to be taxed for the stock owned by him at its par value.

13. If this proviso is to be construed as conferring the power of taxing the shares in national banks, upon the states, then it follows that congress has created fiscal agencies of the general government and institutions to promote the general welfare and given to the different states of the Union the power to destroy them. No court will impute such an intention to any legislature, and it is not to be assumed that Congress has authorized the creation of banks for national purposes and at the same time, given authority to the states to destroy them.

McCullough *vs.* the state of Maryland, 4 Whaton, 316, et seq.

14. The most that can therefore be claimed from this proviso is that it was only intended, to leave the property of shareholders in national banks to be liable to taxation to the same extent as other property of a like description, could be taxed by law. If therefore the shares of a bank, which is a government agent, owned by a citizen of New York could not under general laws be taxed; this proviso gives no authority for their taxation.

15. It is claimed, therefore, that the shares in national banks, in any view of the case are not otherwise taxable than moneyed capital in the hands of individuals or shares in state banks, having no connection with the act of Congress to provide for a national currency; and as no capital, in the hands of an individual, can be taxed by a state, when such taxation will interfere with any instrumentality, which the general government may see fit to employ, so there can be no taxation of the shares in question, and as shares of state banks are not by

any law taxable, there is in no view; by virtue of the proviso, any right of taxation of the shares of national banks, because it is expressly forbidden.

16. But giving all the effect to the proviso that may be claimed for it the taxation in the present case is wholly illegal. At most by this proviso the shares of national banks are put on a par as to taxation with individual capital and shares of state banks. If individual capital is invested in government bonds it is not taxable. The shares of New York state banks are not taxable in any case, and if the capital of such bank is invested in securities of the United States, it is exempt by general laws, and it follows necessarily that the present shares are to the same extent exempt if it can be shown that taxing the shares of the capital stock of a national bank, is practically the taxation of the corporate body or its capital stock.

V. The whole capital of the bank in which the plaintiff is a shareholder being invested in securities of the United States exempt from taxation, the separate shares of such capital stock are also exempt.

1. This claim of a right to tax the shares, involves the proposition that while the whole capital stock cannot be taxed, the separate portions represented by the shares held by individuals may be taxed so that the aggregate of such taxation shall be equal to the whole amount of the capital of the bank. It is difficult to perceive why this process does not result in taxing the whole capital of the bank. The practical effect is obviously the same.

2. The shares into which the capital of a bank is divided by law cannot be separated from the capital itself, without embracing the shadow and rejecting the substance. The shares are not a mere scrip of ornamental paper. Although evidenced by it it has no value except as the representative of so much of the bank's capital, and that value is wholly dependent upon the character of the securities in which the capital is invested, If it is so invested as to be exempt from taxation as a whole, it is equally so when regarded in its aliquot parts.

3. The device resorted to by the legislature of New York in 1863 to evade the decision of this court in 2 Black., 620, failed because it was impossible to see the distinction between taxing a bank "upon a valuation equal to its capital" and taxing its capital or property. And it is equally impossible to see the difference between taxing the capital of a bank as a whole, or a bank on account of its capital, or taxing the same capital in different parcels in the hands of individuals.

4. But it is said that taxing the shares of a banking corporation is not taxing the property in which the capital of the bank has been invested, because the shares are a sort of personal property, and the stockholder has not the legal title to the securities held by the corporate body. This distinction is exceedingly refined, and rests upon the idea of divorcing the real and substantial interest of the stockholder from the corporation of which he is an indispensable element. It is unquestionably true that an individual stockholder as such has not the legal ownership of the securities held by the bank, but it is equally true that he is the substantial owner in proportion to his stock, and his stock has no sort of value disconnected from the bank or its assests.

23 New York Rep., 220, 221 per Comstock J.
Angell and Ames on Corp., § 461.

5. It is said that the shares of stock are personal property, and that the shareholder is taxed on account of his interest in it, but why has it any *value* on account of which the tax is imposed? Simply, because the bank is possessed of valuable assets, which if lost or destroyed, the shares are worthless. It is not therefore possible to separate the real interest of the shareholder from the investment held by the bank. Taxing a bank upon a valuation equal to its capital, is a taxation of the property of the bank, and if taxing the shares is in any sense taxing any part of the capital, the result is the same. The corporation of a bank does not in any proper sense own its capital stock, but has the legal title to the securities in which it is invested as the trustee of its shareholders.

6. But whatever technical distinction may exist between the taxation of stockholder, on account of his interest in the property of the bank, and taxing the bank on account of its property it is easy to see that the practical result is precisely the same, and in the present case the taxation is made to operate directly on the bank, for it is required by the act of the legislature to retain sufficient out of the dividends payable to the stockholders to satisfy the tax, and thus in fact the bank is made liable for the payment of the tax, if the state law is valid. This clearly is taxing the bank, unless there is a distinction between taxing a bank and requiring it to pay a tax.

7. In a preceeding point the effort has been made to show that the proviso in the act of June 3, 1864, does not confer upon the state the right of taxation now asserted and that argument is applicable to the proposition now under consideration and need not be repeated. It is suggested in the opinion of the Court of Appeals (pp. 10, 11), that bonds of the United States issued subsequently to the act of June 3d, 1864, must be regarded as having been received by the leaders,

with a knowledge of and subject to the proviso in question, and when used for banking purposes were made liable to taxation by the state. It is sufficient in reply to this to say that the record shows that every one of the bonds held by the plaintiff's bank were issued under acts of Congress passed prior to June 3d, 1864, and were all declared to be exempt from taxation.

8. It is, therefore, submitted that because, the capital of the bank was invested in the bonds and securities of the United States, which are exempt from taxation, neither the shares of stock or the shareholders, can be lawfully taxed.

VI. But in any view which may be taken, the statute of the state of New York, under which the tax in question is assessed is, unconstitutional and void, and the taxation illegal and unauthorized.

1. This results necessarily, if the exercise of the power of taxation, is an interference with an instrument of the federal government, or in effect the taxation of its securites, which are of themselves exempt from taxation.

2. But if the preceding view is not approved by the court, the law of New York and the taxation under it is void, as being in conflict with the provisions of the act of Congress of June 3d, 1864.

(*a*). By this act, if the state assume to tax at all, it is prohibited from taxing at any greater *rate* than is imposed upon other moneyed capital in the hands of individual citizens of the state. Such capital, invested in securities of the United States, cannot be taxed at any rate whatever; and if the taxation of shares is in any sense the taxation of the property of the bank, it is plain that the limitation in the act of Congress is violated.

(*b*.) There is a further proviso that the taxation of the shares of national banks shall not exceed the rate imposed upon the shares of state banks. No notice of this restriction is taken in the statute of New York and in fact the shares of state books are not taxable, at any rate whatever, by the laws of New York (1 N. Y. Rev. statutes (5th ed.), 907 §14 ,opinion of court of appeals, page 17).

(*c*). Nor is the capital of a state bank taxable if it is invested in the securities of the United States, but under the decision of the court below it is beyond question that the taxation exceeds the authority given by the act of Congress, for the case is precisely the same as if the statute if New York had exempted the shares of state banks from all taxation, and imposed a tax on the shares of national banks. The object of the proviso evidently

was to put both classes of banks upon an equality as to taxation, but this purpose is plainly disregarded by the New York statute. It is easy to see that if this sort of taxation can be sustained, national banks may be taxed out of existence.

VII. The proposition to subject the stockholders of national banks to the burthens of state taxation involves to some extent at least, a violation of the faith of the federal government, which was pledged on the negotiation of these bonds that they were and should be exempt from taxation, and this view of the question is proper to be considered in disposing of this case.

1. That securities of the federal government given for borrowed money should not be subjected to state taxation, was a part of the contract, between the government and the bondholders, within the power of the government to make; cannot be disputed, and if so it is under the protection of the constitution. Neither one of the contracting parties can repudiate it and no state law can impair its obligation.

2. A tax upon these securities or upon any use which may be made of them, incidental to the right of ownership is a tax upon the contract and impairs its obligation. We deny the power of Congress or of a state to do this either directly or by indirection.

3. It is not denied but that the bonds or their owners are exempt from state taxation, but if the stockholders of a corporation, whose capital is wholly invested in this class of securities, may be taxed, upon a value which is wholly based upon the fact that the corporation has made such an investment of its capital it may be asked who has the benefit of the immunity guaranteed by the government? It is idle to answer that it is enjoyed by the corporate body, for that immunity does not benefit the stockholders for whose benefit the corporation holds its property, for he is subjected to taxation because he is a stockholder, and for no other reason.

4. If the proviso in the act of Congress can be construed as a waiver of the right of the federal government to insist that these banks, or bonds, or shareholders shall not be taxed by a state, it is just as much a violation of the contract, as if an act of Congress had expressly authorized such taxation.

5. This court will be reluctant to assume that it was the intention of Congress by the act to provide for a national currency, to violate the public faith and license a state to tax in any form securities which have been issued and negotiated upon the pledge that they should never be subjected to any such bur-

then. Yet this must be assumed if it has been shown that the taxation of shares is practically the same as taxing the bank or its property.

6. It was obviously not the intention of Congress to allow the states to indulge in unfriendly discrimination in respect to taxation against national banks as between them and state institutions, yet such is the effect of the judgment below. For the shares of state banks are not taxable in New York, nor are the banks where their capital is invested in United States securities. Thus state banks escape taxation altogether, but under the judgment of the Court of Appeals the real owners of national bonds are subjected to this unequal burthen, and all equality between state and national banks in respect to taxation is destroyed, and the plain purposes of the act of Congress set at naught.

It is therefore submitted that the judgment of the Court of Appeals be reversed, and the judgment of the Supreme Court of the state of New York affirmed with costs.

JOHN H. REYNOLDS,
Of Counsel for the Plaintiff in Error.

NOTE A.

§ 10. All the shares in any of the said banking associations organized under this act, or the act of Congress mentioned in section one of this act, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate or corporation, in the assessment of taxes in the town or ward where such banking association is located, and not elsewhere, whether the holder thereof reside in such town or ward or not; but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this state, provided that the tax so imposed upon such shares shall not exceed the par value thereof; and provided further, that the real estate of such associations shall be subject to state, county, or municipal taxes to the same extent, according to the value, as other real estate is taxed.

§ 11. For the purpose of collecting such taxes, and in addition to any other law of this state, not in conflict with the federal constitution, relative to the payment, imposition or collection of taxes, it is hereby enacted and declared that it shall be the duty of every banking association organized, or to be organized as aforesaid, to retain so much of any dividend or dividends belonging to any shareholder as shall be necessary to pay any taxes hereby authorized, unless it shall be made to appear to such banking association that such taxes have been paid.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

MICHAEL A. NOLAN and others, as the Board of Assessors of the City of Albany, *Defendants in Error*,

adsm.

CHAUNCEY P. WILLIAMS, *Plaintiff in Error*.

Abstract and Points of Defendants in Error.

The National Albany Exchange Bank in which the plaintiff in error is a shareholder, is a corporation organized on the 23d of January, 1865, under the act of Congress passed June 3d, 1864, entitled "An Act to provide a National Currency, secured by a pledge of United States Bonds, and to provide for the circulation and redemption thereof," that act being Chapter 106 of the first session of the Thirty-Eighth Congress. The bank is located and transacts business in the Fifth Ward of the City of Albany, and was so located for more than a year before this suit was commenced. The plaintiff in error is a shareholder in said bank and had been for more than a year before suit brought. The capital of the bank is three hundred thousand dollars.

At the time of making the assessment hereinafter mentioned, the bank owned, and now owns, bonds of the United States to the amount of three hundred and twenty-seven thousand three hundred and fifty dollars, the whole of the capital stock of said bank being invested in said bonds. The surplus of said bank is eighteen thousand dollars.

The defendants constitute the Board of Assessors of the City of Albany, and assessed the plaintiff in error, in the Fifth Ward, for 287 shares of the capital stock of said bank, which amount he then held and owned, and placed the names of said plaintiff and of all the other stockholders in said bank on the Assessment Roll of the Fifth Ward of said city, and assessed each of them for the par value of said stock, viz.: one hundred dollars per share.

A case was agreed upon between the parties for the purpose of testing the liability of the plaintiff in error to pay said tax, under the 372d section of the Code of Procedure of the State of New York, on which judgment was rendered in favor of said plaintiff in error by the Supreme Court of said State, at September Term, 1865. By such judgment the the defendants in error were restrained from collecting the taxes imposed. From that judgment the defendants appealed to the Court of Appeals of said State, where judgment was reversed, and judgment rendered in favor of the defendants in error. The plaintiff in error thereupon brought a suit of error to this Court.

The question presented is whether the shares of the stockholders in the banking associations created under the acts of Congress which provide for the creation of national banks, can be subjected to taxation by State authorities.

POINTS.

I. The shares of stock in the national banks are declared to be personal property.

Ch. 106, Sec. 12, Sess. 1 of 38 Congress, page 102.
Ang. & Ames on Corp., §§ 557, 558.

All lands and personal estate within the State of New York, whether owned by individuals or corporations, are declared by the Statute of that State to be liable to taxation, subject to the exemptions therein declared.

1 R. S. of N. Y., 5th ed., 905, § 1.

And one of the exemptions is declared by the Statute of New York to be "all property, real and personal, exempted from taxation under the Constitution of this State or under the Constitution of the United States."

1 R. S. of N. Y., 5th ed., 906, § 5.

Congress has no power to declare any species of property exempt from State taxation, except it be property exempted by the Constitution of the United States.

The sole ground upon which the courts have pronounced the taxation of U. S. bonds void, was that it was a violation of the Constitution of the United States.

II. The Constitution of the United States has not, in express terms, exempted either national banks or U. S. bonds from State taxation. But it has been decided by the U. S. Supreme Court that they are exempt by implication, for the several reasons hereinafter mentioned.

In regard to the power of a State to tax the late United States Bank or its branches, it was held that "The State Governments have no right to tax any of the constitu-

tional means employed by the Government of the Union to execute its constitutional powers," and "no power by taxation or otherwise, to retard, impede, burthen, or in any manner control the operations of the constitutional laws enacted by Congress to carry into effect the power vested in the National Government."

McCulloch v. The State of Maryland, 4 Wheaton, 466.

In regard to the power of a State to tax U. S. bonds, the reason given against its exercise was, that it is a tax on the contract between the Government and the individual," a tax on the power to borrow money on the credit of the United States, and consequently repugnant to the Constitution."

Weston vs. The City of Charleston, 2 Peters, 465, 469.
Bank of Commerce vs. The City of New York, 2 Black, 620.
Bank Tax Case, 2 Wallace, 200.

III. If it is claimed that this tax is not maintainable because the bank in which the shares are owned is a national institution, and one of the constitutional means employed by the Government, the position is untenable.

1. Because the banks in question are not such instruments of the Government as to exempt them from taxation.

There was much more reason for holding that the late Bank of the United States was an instrument of the Government created for the purpose of carrying on its constitutional operations, than there is for saying that the national banks of the present day are such instruments.

The Government owned seven millions of the thirty-five millions of capital of the former Bank

of the United States, and appointed five of its twenty-five directors, and it contributed one million and a half of its funds to the public resources. It was made subject to the visitation of the Secretary of the Treasury, and was bound to obey his orders, for transferring the public funds, without charge for exchange, to all parts of the United States and the Federal Territories.

None of these features belong to the banks now called national banks. It is true they are used as depositories of the public funds, and so were the state banks for many years; but it was never claimed that, for that reason, they were such instruments of the Government as to be exempted from taxation.

It was said of the late Bank of the U. S., by Ch. J. MARSHALL, in Osborn v. The Bank of the U. S., 9 Wheat., 769: "The casual circumstance of its being employed by the Government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power (the taxing power of the state), than it would exempt the private business of any individual."

The decisions in 4 Wheat. and 9 Wheat. were put on the express ground (9 Wheat., 770,) that the bank was not "a private corporation, whose principal object was individual trade and individual profit, but a public corporation, created for public and national purposes," and was "necessary and proper for carrying into effect the powers vested in the Government," and it cannot be justly claimed that that decision is applicable to the present national banks.

As well might it be claimed that personal property, invested in a line of stages, or in the

stock of railroads, employed in carrying the U. S. mails, or in an express company, engaged in carrying parcels for the Government, or in a telegraph company, employed in transmitting messages for the Government, is exempt from taxation.

2. But conceding, even, that the banks called National Banks, are to be governed by the same rule as that applied to the late Bank of the United States, the conclusive answer to the exemption claimed is, that the banks themselves are not taxed, nor is any question of right to tax such banks involved in this case.

It was decided in McCulloch vs. the State of Maryland, that the late Bank of the United States was not liable to state taxation—but it was also decided in that case, that the shareholders were liable to such taxation.

Though taxing the bank itself, which was the active, living instrument of the Government, was, for that reason, held to be unconstitutional, it was held that the interests of the *shareholders* were not within either the prohibition or the reason for it, for it was held in that case, that though the Legislature of Maryland had no power to impose a tax on the Bank of the United States, and that such tax was unconstitutional and void, yet that the State might tax the real estate owned by the bank, *and the shares of stock which the citizens of Maryland held in the institution.*

4 Wheaton, 491.

In that case, it became necessary to define and declare the precise limit of the taxing power, and

the Chief Justice concluded a full examination of the question, as follows:

"This opinion does not deprive the states of any resources which they originally possessed. It does not extend to a tax, paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed upon the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the state. But this is a tax on the operations of the bank; a tax on the operations of an investment employed by the Government of the Union, to carry its powers into execution. Such a tax must be unconstitutional."

The reasoning of this case is repeated and the decision reaffirmed in Osborn vs. The Bank of the U. S., 9 Wheat., 738, 769, and in the License cases, 5 Howard, 576.

The enforcement of a tax on the bank itself, being upon the operations of the bank, might be the means of suspending its operations and depriving the Government of the use of its instruments. But a tax on the shareholder could only be enforced against him personally, and could to no degree, interfere with the operations of the bank. A sale under the tax of his shares of stock, would only substitute a new stockholder in his place, and in no respect delay the business operations of the bank.

Of the distinction thus taken, it is well said by DENIO, Ch. Judge, in pronouncing the judgment now under review:

"It was the consideration of the mixed character of the purposes for which the Bank of the United States was incorporated, and the two-fold character of its operations, and of the interests it

was intended to promote, which led the Supreme Court of the United States, in determining the question of the liability of that institution to taxation, carefully to discriminate between the interests of the individual shareholders, which represented their private investments in the stock, and the corporate body itself."

(For a more full discussion of the reasons for this discrimination between taxing the bank and taxing the shareholders, see the next Point.)

3. It has been expressly decided that stock in the Bank of the U. S. held by individuals may constitutionally be taxed by a State.

Bulow v. The City of Charleston, 1 Nott & McCord, 527.
State v. Collector, 2 Bailey, 654.

And it is believed that no different rule of law on this point has been claimed, either in the State or U. S. Courts.

IV. If it is claimed that this tax is not maintainable under the decisions in 2 Peters, 2 Black and 2 Wallace, above cited, on the ground that this is a tax on the bonds, or rather on the owner of the bonds of the United States, we answer, the tax is not on the bonds nor on the bank owning such bonds, as it was in the cases cited.

1. The bank is a corporation—an artificial person, and has an independent legal existence, and is the legal owner of the bonds. The bank alone can buy and sell and control the corporate property, and the bank alone can be taxed for any taxable property it may own.

The stockholder is, in no sense, the legal owner of the bonds. He did not buy them and cannot sell them. He can exercise no control whatever over them. He has no right to their custody, or even to see them. They cannot be sold at law, or reached by proceeding in equity to satisfy a debt of the stockholder. They are only liable for a debt of the corporation. The holder of the bills and not the shareholder, has the first claim on the assets of the bank, and is the better entitled to be called the owner.

2. The shares of stock belonging to the shareholder are only *choses in action*, in regard to which his only claim is on the corporation, and not on the United States. Those shares represent a business enterprise—profit or loss by banking, surplus profits—an interest to, perhaps, three times the amount of the capital in discounted paper, or credits at other banks, and an interest in or liability for a circulation of bank notes. The shares of stock represent the investment—the *speculation*, whether it be a good one or a bad one; and it is almost invariably the former, the profits being generally very large. In this case, a surplus has already been accumulated, in addition to dividends made.

3. The bank owns the U. S. bonds. The shareholder in the bank owns merely the right to a share of the profits made in *banking* on such bonds.

A bank share, costing originally but $100, may have a market value of three times that sum, not because the capital of the bank has been increased, but because, by reason of the skillful management of the bank and the great

privileges conferred with its franchise, large dividends are made.

The shareholder paid his money to the bank, not for U. S. bonds, but for a chance in the speculation, and he took a certificate accordingly. The bank may own the U. S. bonds one day and sell them the next, but the stockholder's rights and interests remain the same. They are in no way affected by the question whether the bank does or does not own any U. S. bonds.

A share of corporate stock is defined to be "a right to partake, according to the amount of the party's subscription, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted."

Ang. & Ames on Corp, § 557.
Wildman v. Wildman, 9 Vesey, 177.
Kirby v. Potter, 4 Vesey, 751.
Bank of Waltham v. Waltham, 10 Metc., 339.

That the shareholder is not, in a legal sense, the owner of the corporate property, is apparent from the consideration that though the corporate property consist of real estate, the shares are still personal property.

2 Kent's Com., 341, note.

It is said "the land, buildings, &c., of companies are the mere instruments whereby the company is made to produce a profit, *and moreover, belong exclusively to the corporate body, which is altogether a separate person from the individual members.*"

Ang. & Ames on Corp., § 557.
Bradley v. Holdsworth, 3 Mees & Welsh., 334.

The same view as to the ownership of shareholders in the property of a corporation has been recently taken by the Queen's Bench in England, in The Queen v. Arnoud, 9 Adolphus & Ellis, N. S., 806.

The British acts of Parliament forbid the registry of a ship as a British vessel, unless it is wholly owned by British subjects. If a part owner is not a subject, it cannot be registered.

A mandamus was sued out to compel the registry of a vessel owned by a British corporation, some of the shares of which were owned by foreigners. Judgment was given for the plaintiff, sustaining the right of registry. Lord DENMAN said:

"It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested in the property of the corporation, as they may derive individual benefits from its increase, or loss from its decrease; but in no legal sense are the individual members the owners."

There may be a large surplus of profits belonging to the bank, exceeding the value of the U. S. bonds that the bank may own; but neither the bank nor the shareholder can be taxed for such surplus—the bank not being taxable at all, and the limit of taxation on the shareholder being the par value of his stock.

Chap. 97, Sess. Laws of N. Y. for 1865, § 10, page 173.

4. The contract to be protected by the Constitution is between the Government and the corporation, not between the Government and the shareholder,

There is a reason for not taxing a bond held as an investment. There the holder is restricted in his profit to the interest agreed to be paid. To tax the holder would lessen a fixed compensation. But when the privilege and profit of banking on the bond are given, the reason for exemption no longer exists. The tax is on the franchise and not on the bond, and such was the view taken on this subject in Congress when the act under which these banks were authorized was passed, containing the express authority to tax the shareholders.

5. In the case in 2 Black., it seems to be conceded that the State may tax the nominal capital of a bank without regard to value or valuation, whether it held U. S. stocks or not—for, in that case, it would tax the franchise and not stock; and the distinction here is still wider between the shares of the stock and the bonds held by the corporation, than it would be between the nominal capital of a state bank and the U. S. bonds in which it was invested.

V. Thus far we have examined the right to tax these banks, as it exists, independent of any action of Congress. But the act of Congress, chap. 106, first Session of the 38th Congress, sec. 41, passed June 3d, 1864, under which National Banks are organized, expressly permits the stockholders of such banks to be taxed on *all* their shares, and it gives this permission in the same act by which it provides for investing the capital, or a portion of it, in U. S. bonds.

And that it was not deemed to be a taxing of the bonds, is evident from the fact that no deduction is provided for, or required to be made for the capital so invested.

The only proviso is, that the *rate* shall not be greater than is assessed upon other monied capital, or on banks organized under state authority.

Stockholders in National Banks cannot be assessed at the *rate* of *two* per cent, when state banks are assessed at the *rate* of *one* per cent. There is no ambiguity in the language employed, nor any doubt as to the meaning of the word *rate*.

It is conceded that Congress has no power to regulate the machinery of state taxation—and, perhaps, none to say *where* the tax shall be assessed. And it is conceded that Congrese can confer no additional powers on state governments.

But has not Congress the power to surrender a claim as regards property belonging to the United States? May it not waive a right?

We do not think Congress has done so in this case, for we have already shown that the right to tax bank shares exists independent of any action of Congress. But would not Congress have the right to say the state might tax certain bonds which it then proposed to issue?

The immunity from taxation is adjudged on the sole ground, and only so far as such exemption is necessary for the National credit or for the public interest. Congress is the sole guardian of that credit and of such interests; and if Congress, in its discretion, decides that the public interests require that such exemption should be waived, surely the waiver would be valid and effectual.

Although, therefore, Congress, by its enactment, can add nothing to the force of the constitutional prohibition, yet, inasmuch as that constitutional prohibition, resting only on implication, extends no further than the protection of the public interests may require, and as Congress is the sole judge of the extent to which such protection is necessary, Congress may, in its discretion, waive the exemption.

The holder of a U. S. bond cannot complain of such an exemption when the same act of Congress conferred on him a franchise, and the means of adding largely to his profits by using the bonds for banking, and when the exemption from taxation was only to be waived in case the holder should elect to avail himself of the additional profits afforded him by such use of the bonds. In permitting the States to tax the shareholders, Congress recognizes the right of the State in which the bank is located, and whose laws and officers protect the persons and property of the stockholders, to call for a contribution of a joint portion of the expense; and Congress also, by the act in question, initiates a policy which, by equalizing the burthens of taxation, satisfies the public sense of justice, and thus strengthens the public credit.

VI. There is no breach of faith by Congress in subjecting the shares of stock to taxation, although the whole amount of the capital of the bank was required to be, and in fact was, invested in United States securities, which when purchased by the bank, were exempt from State taxation.

1. The bonds were not, before they were authorized to be made the basis of banking, exempt from such burdens as Congress might see fit to impose upon their owners. They were merely exempt from State taxation for the benefit of the Federal Government.

2. When Congress authorized these bonds to be made the basis of banking, authorized the owners to issue notes to circulate as money upon a pledge of them, they granted to the owners a privilege

at their option, and had a perfect right to subject them, when used for this purpose, to State taxation.

The present provision in § 41, was reported by the Senate Finance Committee in the place of a provision which contained this clause: "Provided, that no State tax shall be imposed on any part of the capital stock of such associations invested in the bonds of the United States, deposited as security for its circulation." On the amendment reported by the committee, there was a long dicussion on the point, whether any portion of the shares should be exempted from State taxation, by reason of any United States bonds the bank might hold, and on every vote the expression was very strong against the exemption.

Senator FESSENDEN and Judge COLLAMER, both forcibly argued that the shares should be made taxable, without reference to the amount of United States bonds the bank held, and more than two-thirds of the Senate agreed with them. FESSENDEN said, (*Cong. Globe, p.* 1872,) "We do not break faith at all; because when we proposed to exempt certain bonds, issued by the Government and and purchased by individuals, from State taxation, it was simply as property so much invested, not as property used for the purpose of banking, giving to it another and distinctive character. We say simply in reference to this matter: 'If you choose, instead of specie or any other property that you have, which is to be deposited as security for your bills, you may deposit, and we will accept, bonds of the United States.' That is a privilege we give them. Then we say, when there is an organization of a bank in this way, and the persons who put their capital into it take it out of their other

business, or their other means, subject as that is to State taxation, and put it in this particular bank, that that capital shall remain subject to State taxation precisely in the same way that other property is, or that it was before they invested it in that particular mode. This is all we say with reference to it. The question as to taxing these banks out of existence which has been talked about, has not the slightest application in the world; because we limit the power of State taxation. They must tax this property thus invested precisely as they tax other personal property, and to no greater extent. The power of taxation is limited in the same way."

Judge COLLAMER said, (p. 1890,) "I insist that a tax upon the shareholders in a bank is no tax upon the stock of that bank." * * * "But to say that a tax upon the shares of a bank is a tax on the bonds that constitute the capital of that bank, is utterly fallacious." * * * "The truth is, that when we gave out these bonds to the people, all the assurance given to them was that they should not be taxed by the states. A man may have them and hold them, and I grant that they are property in one respect. For instance: they are the means of making a pledge; they can be used as collateral security for borrowing money. They are valuable in other ways, besides the interest received from the Government. But when you undertake to make a law by which you transfer them into banking capital, and enable the man who holds them, not to borrow money upon them, but to lend money upon them; that is entirely a different affair; that is entirely a new privilege, and one

to which, when granted, the Government may annex such conditions as it thinks proper."

At page 2,199, Judge COLLAMER further says: "But when we undertake to make them (United States bonds) into bank capital, and authorize the associations to issue currency upon the strength of them, and bank upon them, that is entirely a new privilege. That is the privilege of loaning money on them, not borrowing money on them; and for that new privilege of using these bonds as a banking capital, the Government has a right, of course, to annex to the grant of that new privilege such conditions as it may think proper, and it has annexed a great many conditions in this bill."

VII. The property being by law taxable, the Legislature has provided fully as to the mode and place of taxation, by passing an enabling act and re-enacting the provision made by Congress, by which shareholders were to be subjected to taxation.

Ch. 97, Sec. 10 of Laws of 1865, passed March 9, 1865.
Sess. Laws of 1865, page 172.

VIII. The judgment of the Court of Appeals of the State of New York should be affirmed with costs.

AMASA J. PARKER,
Attorney and of Counsel for the defendants in Error.